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(translated by Dr. Stephanie Anderson, EHESS@ANU program, October 2014)

The New Caledonian citizen is quite clearly defined

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The notion of the New Caledonian citizen is quite clearly defined by the Constitution and the organic law in its articles 4 and 188. The electoral body is known down to the last name (Mathias Chauchat, "Les institutions en Nouvelle-Calédonie", CDPNC 2011, p. 33 et seq.). It will be recalled, to put it succinctly, that, since the Noumea Accord puts an end to colonisation, it puts an end to further settlement from outside. That is the simple explanation for the restrictions imposed on the electoral body.

Under the pretext of defining citizenship it is periodically proposed that its boundaries be widened. The public statements of her position by Anne Gras, who had already intervened in a meeting devoting to the electoral body at the request of High Commissioner, are no exception to this.

1. Citizenship is precisely defined in articles 4 and 188 of the organic law

Article LO. 4

There is established a citizenship for New Caledonia to which are entitled persons of French nationality who fulfil the conditions set down in article 188.

Article LO. 188

1. – The congress and the provincial assemblies are elected by an electoral body composed of the voters satisfying one of the following conditions:

a) To fulfil the conditions to be enrolled on the electoral rolls of New Caledonia set up in view of the consultation of 8 November 1998;

b) To be enrolled on the auxiliary register [tableau annexe] *and resident for ten years in New Caledonia at the date of the election for the congress and provincial assemblies;*

c) To have attained the age of majority after 31 October 1998 and either to be able to prove ten years of residence in New Caledonia in 1998, or to have had one of their parents fulfilling the conditions to be a voter at the election of 8 November 1998, or to have one of their parents enrolled on the auxiliary register and to be able to prove ten years of residence in New Caledonia at the date of the election.

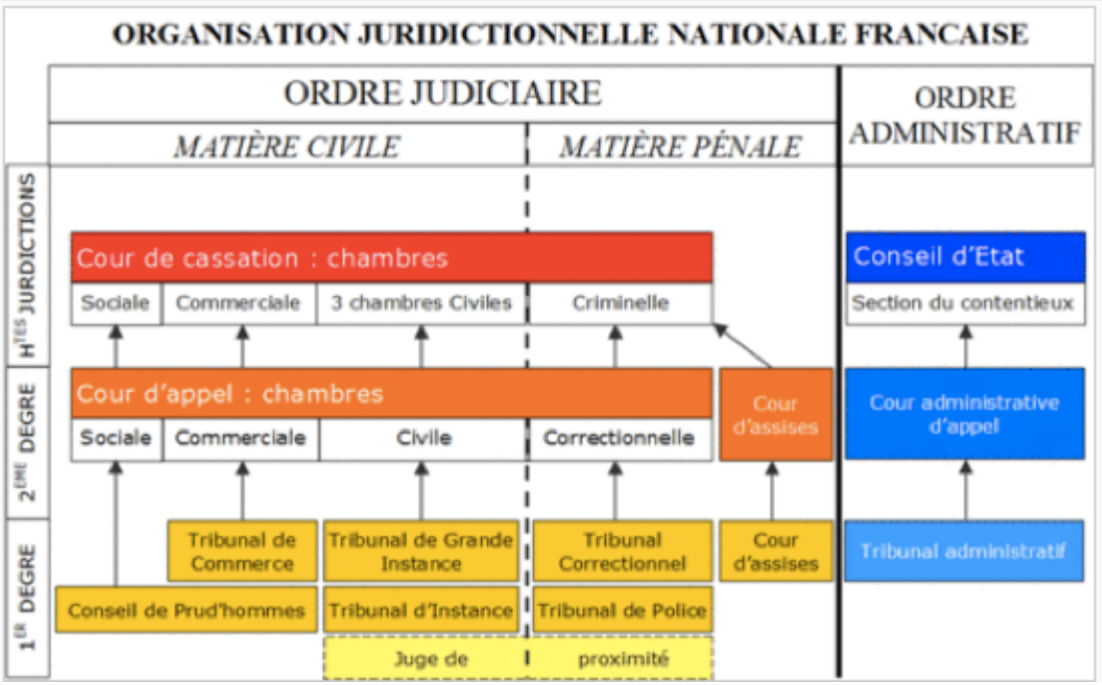
II – The periods passed outside of New Caledonia to perform national service, to pursue studies or training or for family, professional or medical reasons do not, for persons who were previously residing there, constitute an interruption to the time period taken into consideration for assessing the residence condition.

The freezing of the electoral body in 2007 introduced new legal provisions into the Constitution. The new article 76, last paragraph, of the Constitution states: "*For the definition of the electoral body called upon to elect the members of the deliberative assemblies of New Caledonia and the provinces, the register referred to by the accord mentioned in article 76 and articles 188 and 189 of the organic law n^{o} 99-209 of 19 March 1999 relating to New Caledonia is the register drawn up on the occasion of the election provided for in the said article 76 and including the persons not allowed to take part in it*".

2. The Court of Cassation[1] applies the legal demands to the letter

It is currently thought that the starting point of citizenship ([to be entered on the electoral roll for] provincial assembly elections [*le corps provincial*]) is the date of arrival in the country (before 8 November 1988). However, the Court of Cassation, in 2011, noted that it was the date of enrolment on the special list that counted, and not the date of arrival; **Court of Cassation**, civil chamber 2, of 16 November 2011, n° of appeal: 11-61169, Mme Jollivel: "*given that paragraph 1-a) of article 188 of the organic law n° 99-209 of 19 March 1999 relating to New Caledonia allows the enrolment on the special electoral roll for the election of the congress and provincial assemblies of New Caledonia of the electors having fulfilled*

[1] [Note by S.T.] The Court of Cassation, in French *Cour de cassation*, is the highest order in the French judicial system; it might be called the High Court of Appeal. Broadly speaking, the French system, like many others, has three levels of court : Courts of First Order [*première instance*] (in New Caledonia: Noumea and several "detached sections" in the Provinces of Grande Terre and in the Loyalty Islands), Court of Appeal (Noumea), and "Court of Cassation", which is the highest order, with jurisdiction over the whole of the French system, and thus located in Paris. Yet, the translation "High Court of Appeal" could create ambiguity, as this Court is not constituted as the highest order of court of "appeal". The Court of Cassation does not reconsider for a third time the substance of a complaint or a penal case, but only verifies if, in the first instance and then during the appeal procedure, all legal procedures have been correctly followed and the laws correctly interpreted. Of course, on the last point, this can amount to a case being reconsidered through reconsidering how it has been dealt with in the lower courts.
A summary view is provided by this diagram :
http://fr.wikipedia.org/wiki/Organisation_juridictionnelle_(France)



the conditions to be enrolled on the electoral rolls of New Caledonia established in view of the consultation of 8 November 1998; that paragraph 1-b) of the same article also provides for the enrolment on this special electoral roll of the persons enrolled on the auxiliary register [tableau annexe] *and resident in New Caledonia for ten years at the date of the election; that article 77, last paragraph, of the Constitution, as amended by constitutional law n° 2007-237 of 23 February 2007, specifies that the auxiliary register is that drawn up on the occasion of the election of 8 November 1998 and including the persons not allowed to take part in it;*

And given that the judgement holds that Mme Y..., although present in the territory for more than a year in November 1998, had not, for personal reasons, done what was necessary to be enrolled on the general roll and, for that reason, on the auxiliary register or on the special roll; that she had only enrolled on the general roll in 2007; that from these statements and pronouncements the Court of First Instance [le tribunal de première instance] *has concluded precisely that Mme Y... was not permitted to be enrolled on the special electoral roll of her commune*".

This decision is commented upon on the website of LARJE: http://larje.univ-nc.nc/index.php/les-travaux/faits-et-analyses/273-la-brutalite-du-gel-du-corps-electoral

This jurisprudence was ratified again by the Court of Cassation, in an explicit decision, of 5 December 2012, appeal n° 12-60.526, Mme Oesterlin.

In the *Nouvelles calédoniennes*, dated Thursday, 9 May, Anne Gras considers that the decision of the Court of Cassation goes beyond the constitutional reference to the auxiliary register: "*the Court of Cassation replaces the expression "to fulfil the conditions" by "having fulfilled the conditions", which is not equivalent*".

Anne Gras' article in the *Nouvelles calédoniennes* of 9 May 2013 can be obtained here:
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To understand the confusion that has resulted it is necessary to refer back to the conditions of article 188 which are alternatives (to satisfy "*one of the following conditions*"):

- Point a) *To fulfil the conditions to be enrolled on the electoral rolls of New Caledonia set up in view of the consultation of 8 November 1998* applies exclusively to those who could vote in 1998, therefore had the right, by their presence since 1988 in New Caledonia, to being enrolled on the register [*tableau*] of citizens (that is, following article 76 of the Constitution, "*the persons fulfilling the conditions set out in article 2 of law n^{o} 88-1028 of 9 November 1988*"). Mme Jollivel had only been present [in the territory] for a year and could therefore not vote, on those grounds, in 1998.
- Point b) *To be enrolled on the auxiliary register [*tableau annexe*] and resident for ten years in New Caledonia at the date of the election for the congress and provincial assemblies* applies exclusively to the persons who are not citizens who arrived between 1988 and 1998. We note that it is imperative "*to be enrolled on the auxiliary register*". But Mme Jollivel did not fulfil that condition, being present since 1997, but enrolled only in 2007.
- Point c) *To have attained the age of majority after 31 October 1998 and either to be able to prove ten years of residence in New Caledonia in 1998, or to have had one of their parents fulfilling the conditions to be a voter at the election of 8 November 1998, or to have one of their parents enrolled on the auxiliary register and to be able to prove ten years of residence in New Caledonia at the date of the election* applies to young people. In 1998 the law of blood [*droit du sang*] came into effect: one must necessarily have, in addition to the condition of 10 years of continuous residence, a citizen parent, either according to the conditions of 188-a, or those of 188-b.

The confusion caused by Anne Gras is to mix together the terms of article 188-a and those of article 188-b, when they are not addressed to the same categories of people. For the people "*who fulfilled the conditions to vote in 1988*" and therefore in 1998 (first freeze of 10 years), it is sufficient for them to be enrolled on the roll of the election of 8 November 1998. But these people are citizens. For those people who arrived between 1988 and 1998, it is necessary, by contrast, to "*have been enrolled*" on the auxiliary register before 8 November 1998. Any other interpretation would consist of an implicit constitutional revision of the freezing of the electoral body.

Point II of article 188 according to which "*II – The periods passed outside of New Caledonia to perform national service, to pursue studies or training or for family, professional or*

medical reasons do not, for persons who were previously residing there, constitute an interruption to the time period taken into consideration for assessing the residence condition" authorised the Kilikili jurisprudence of the Court of Cassation of 26 May 2005, under appeal n° 05-60166, as to the acceptable interruptions of residence. This jurisprudence settles the difficult question of the New Caledonians who were absent at the two essential times that gave access to citizenship (the vote of 6 November 1988 on the status of Matignon and that of 8 November 1998 on the Noumea Accord), and have not on that account been able to become part of the electoral body. The Court of Cassation accepts rather broadly the "right to return" of New Caledonians, including after a long period of absence. The question of the New Caledonians, born here and who would supposedly be excluded from the electoral body, has thus already been settled by the Court of Cassation.

This decision is commented upon on the website of LARJE: http://larje.univ-nc.nc/index.php/les-travaux/veille-juridique-et-jurisprudences/87-larret-kilikili-sur-la-qualite-de-citoyen-de-la-nouvelle-caledonie

3. The priority question of constitutionality [PQC] is without grounds

The proposal of PQC suggested by Anne Gras is not normally acceptable, since the decisions of the Constitutional Council[2] are final and absolute. But she points to "*the change of circumstances*" with the freeze of 2007, which alone would allow the Constitutional Council to reopen examination of the question. Whatever the court before which the priority question of constitutionality is raised, this question can only be transferred to the Court of Cassation or referred by the Court to the Constitutional Council if the contested decision "*has not already been declared to be in conformity with the Constitution in the motives and the purview of a decision of the Constitutional Council, except in the case of a change of circumstances*" (2° of article 23-2 of the amended organic regulation n° 58-1067 of 7 November 1958,

[2] [Note by S.T.]This is a different Council from the State Council mentioned in the diagram above n. 1 (see, in French : http://www.vie-publique.fr/decouverte-institutions/institutions/fonctionnement/autres-institutions/)
The Constitutional Council verifies that the laws passed by the French Parliament and international treaties signed by France are in accordance with the Constitution. The State Council is the highest court in administrative matters on the one hand, and on the other the highest council which verifies that laws and decrees drafted or passed by Government are in accordance with the established institutions and legislation currently applying throughout the whole of the French legal system.

concerning courts coming under the authority of the Court of Cassation; article 23-4 concerning the Court of Appeal). These are the courts that assess the notion of change of circumstances and ultimately the Constitutional Council itself.

Her arguments are not, in the end, acceptable. The freeze has in no way intervened in the text of article 188 of the organic law. There is therefore no change of circumstances. The question has, moreover, been settled by the Court of Cassation which has applied to the letter texts judged to be in conformity with the Constitution by the Constitutional Council. A PQC would be a manoeuvre aiming to get the Constitutional Council take a political position to neutralise the demands of the Noumea Accord.

4. A law of the country [*loi du pays*] *can* be useful to define the content of New Caledonian citizenship

A law of the country is frequently called for in order to define New Caledonian citizenship. Now the Congress, like the other institutions of the State, is bound by the terms of article 77 of the Constitution which sets out that: "*the organic law, taken after advice from the deliberative assembly of New Caledonia, determines, in order to ensure the development of New Caledonia in respect of the directions defined by this accord and according to the modalities necessary to its setting up: (...) the rules relative to citizenship, to the electoral regime, to employment and to customary law civil status".* Such a law of the country would intervene outside of its field of application and would infringe on the domain of the organic law itself. It is therefore less a matter of assigning to this law of the country the task of defining citizenship than of intervening in its potential content.

Citizenship is not merely local employment and the right to vote. "*A reference to the name of the country could be inserted on the documents of identity as a sign of citizenship*" (point 1.5 of the Accord). It is for the State to add to the [French] national identity card the reference: "*citizen of New Caledonia*". This document could be called for before the commission for local employment. In addition, an official booklet of welcome for arrivals at Tontouta [the international airport of New Caledonia] which explains their status to the "*residents*" could be made available, and it could be distributed in the schools as well. Citizenship is also the future civil status of the New Caledonians which should in the future differentiate them from the residents subject to their status of origin, whether that status is metropolitan or foreign, and from the Kanaks of customary status. Finally, without even amending the existing law,

the notions of "*Kanak people*" and "*community*", both of which are recognised by the Noumea Accord, can be used to put in place specialised measures "*of affirmative action*" (or "*positive discrimination*") with the aim of achieving improved equality in concrete terms or of redressing economic or social imbalances.

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